

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>OHS COMPCARE</b>	)	Docket No. 08DL0005 WC
Appellant	)	Claimant: Amy Smith
	)	Docket No. 08DL0006 WC
AND	)	Claimant: Scott Parsley
	)	Docket No. 08DL0007 WC
<b>KASB RISK MANAGEMENT SERVICES;</b>	)	Claimant: Terry Horner
<b>KANSAS MUNICIPAL INSURANCE</b>	)	Docket No. 08DL0008 WC
<b>TRUST; ALTERNATIVE RISK</b>	)	Claimant: Oliver Ison
<b>SERVICES, et al.</b>	)	Docket No. 08DL0009 WC
Appellees	)	Claimant: Teresa Truman
	)	Docket No. 08DL0010 WC
	)	Claimant: Danette Michaels
	)	Docket No. 08DL0011 WC
	)	Claimant: Stacy Kahnt

**ORDER**

**STATEMENT OF THE CASE**

OHS CompCare requested review of the November 14, 2008, Initial Order entered by Presiding Officer Sandra L. Sharon.<sup>1</sup> The Board heard oral argument on April 7, 2009. Charles W. Hatfield, of Jefferson City, Missouri, appeared for OHS CompCare (appellant). Frederick J. Greenbaum, of Kansas City, Kansas, appeared for appellees KASB Risk Management Services, et al. (appellees). There were no other appearances or parties.

The Presiding Officer (PO) found: "The modifications made by the third party payors on behalf of the Claimants on the medical claims, which are the subject of review in this matter, are appropriate under the Kansas Workers Compensation Act."<sup>2</sup>

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<sup>1</sup> The Initial Order is not dated, but it contains a Certificate of Service that is dated November 14, 2008.

<sup>2</sup> Presiding Officer's Initial Order filed Nov. 17, 2008, at 5.

RECORD

The Initial Order does not contain a list of witnesses and exhibits or otherwise designate the record presented to and considered by the PO. As a result, on December 5, 2008, the Board issued a Request for Designation of Record, whereby the Agency was requested to designate the contents of the record on appeal. Thereafter, the Board received a letter dated December 15, 2008, from the Director of the Office of Administrative Hearings which listed "the official record." This was followed by a letter from counsel for the appellees dated December 19, 2008, which read, in part:

I have reviewed the communication forwarded by Tracy Diel, Office of Administrative Hearings, dated December 15, 2008. It does not appear the complete record in this case is described. The items missing include the second day of hearing which took place on August 27, 2008. There were exhibits attached to that hearing. Also missing are the two transcripts of deposition of Dr. Jeffrey Wheeler from the Kansas Foundation taken April 30, 2008 and again on June 5, 2008. There are nine deposition exhibits in the April 30, 2008 deposition. There are eight exhibits in Dr. Wheeler's deposition of June 5, 2008. Said depositions were offered on pages 534 and 535 of the Transcript of Proceedings dated August 27, 2008. The exhibits as presented at hearing are noted in the Transcripts of Proceedings.

The Board forwarded a copy of this letter to the Director of the Office of Administrative Hearings and requested the Director to "[p]lease provide either confirmation that your letter correctly listed the official record or an amended itemization of the official evidentiary record that was considered in this matter by Administrative Hearing Office Sandra Sharon."<sup>3</sup>

In her January 22, 2009, reply letter, the Director of the Office of Administrative Hearings stated:

The itemized record which was forwarded to you by the Office of Administrative Hearings (OAH) is all this office has in its possession. OAH does not have the second day of the transcript, which is referenced in Mr. Greenbaum's letter dated December 19, 2008. Neither party ordered the transcript of the second day or provided it to this office. Therefore, OAH cannot certify it as being in the record, which this office holds.

The depositions which Mr. Greenbaum references in his correspondence, appear to have been introduced into evidence during the second hearing day and became exhibits. They would also be with the transcript of the second day of the hearing. As indicated previously, OAH does not have this transcript. OAH cannot

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<sup>3</sup> Board's letter to Director of Administrative Hearings of January 16, 2009.

certify the deposition/exhibits and forward to the Board that which it does not have in its possession.

Upon receiving Mr. Greenbaum's letter, this office contacted the Division of Workers Compensation about the issues raised. We were told that the depositions which Mr. Greenbaum referenced were in the possession of the Division of Workers Compensation and they would arrange for them to be provided to the Board. It was my understanding this had been done. As for the issue of the transcript, normally this issue is dealt with by the respective parties through the certified court reporter.

I hope this clarifies the issue for the Board. I apologize for any confusion.

During the April 7, 2009, oral argument to the Board, counsel for the parties indicated their agreement that the record designated by the Director of the Office of Administrative Hearings was incomplete and that the record on appeal should include the items listed in the December 19, 2008, letter from counsel for appellant. Therefore, the Board requested counsel to "prepare and sign a Joint Stipulation as to the contents of the record in this appeal."<sup>4</sup> The parties filed a Joint Stipulation As to Contents of the Record on May 15, 2009.

### **ISSUES**

Appellant requests review of whether the PO's decision that the modifications made by the appellees were appropriate under the Workers Compensation Act (Act) was supported by substantial competent evidence. Specifically, appellant argues:

(1) The PO erred as a matter of law by not placing the burden of proof on the appellees to prove appellant's codes were excessive. Appellant further contends the PO failed to find its codes were excessive and improperly ruled in favor of the appellees.

(2) The PO erred by imposing requirements on it that are not required under the Act. Appellant argues the PO effectively ruled that medical providers in Kansas who assign billing codes pursuant to the CPT book are coding incorrectly. Appellant requests the Board find that the PO's ruling required more of OHS than what is required in the CPT book and the 1995 Guidelines and, accordingly, requests the Initial Order be reversed.

(3) There was not substantial competent evidence supporting the PO's determination that its bills lacked a "quantative aspect" supporting the billing level assigned. Appellant argues that its treating physicians provided a sufficient description of their examinations; that it is entitled to decide whether to use either the 1995 or 1997 Guidelines in conjunction with the CPT book; and that the Kansas Foundation for Medical

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<sup>4</sup> Board's letter to counsel of April 9, 2009.

Care (KFMC) reports are not substantial competent evidence supporting a finding against appellant.

(4) There was not substantial competent evidence that appellant's coding practice resulted in inflated coding. Appellant contends that no evidence that its codes were excessive was presented at the hearing; that neither KFMC nor the appellees, through its consultant, Shorman Solutions, found its billing codes to be excessive; that its codes cannot be deemed excessive as they are consistent with the CPT book and the 1995 Guidelines and are consistent with Kansas law; and that the PO's focus on the outcome of the treatment was improper.

The appellees request the Board to affirm the Initial Order of the PO, asserting that the PO did not err in assigning the burden of proof and, in fact, found that appellant's bill submissions were excessive; the PO did not impose requirements on appellant other than those required by law; and there was substantial competent evidence supporting the PO's findings that appellant submitted inflated claims.

The issue presented for the Board's review is: Was the PO's decision that the modifications made by the appellees were appropriate under the Workers Compensation Act (Act) supported by substantial competent evidence?

The threshold issue, however, is whether the Board has jurisdiction of this appeal.

#### **PRINCIPLES OF LAW**

K.S.A. 44-510j(d) states in part:

After the entry of the order indicating that the parties have not settled the dispute after the informal hearing, the director shall schedule a formal hearing.

...

(2) The formal hearing shall be conducted by hearing officers, the medical administrator or both as appointed by the director. During the formal hearing parties to the dispute shall have the right to appear or be represented and may produce witnesses, including expert witnesses, and such other relevant evidence as may be otherwise allowed under the workers compensation act. If the director finds that a provider or facility has made excessive charges or provided or ordered unjustified treatment, services, hospitalization or visits, the provider or facility may, subject to the director's order, receive payment pursuant to this section from the carrier, employer or employee for the excessive fees or unjustified treatment, services, hospitalization or visits and such provider may be ordered to repay any fees or charges collected therefor. If it is determined after the formal hearing that a provider improperly utilized or otherwise rendered or ordered unjustified treatment or services or that the fees for such treatment or services were excessive, the director may provide a report to the licensing board of the service provider with full

documentation of any such determination, except that no such report shall be provided until after judicial review if the order is appealed. Any decision rendered under this section may be reviewed by the workers compensation board. A party must file a notice of appeal within 10 days of the issuance of any decision under this section. The record on appeal shall be limited only to the evidence presented to the hearing officer. The decision of the director shall be affirmed unless the board determines that the decision was not supported by substantial competent evidence.

### ANALYSIS

K.S.A. 44-510j(d)(2) provides for review by the Board of the decision of the Director. If substantial competent evidence exists for the Director's decision, then that decision must be affirmed. While the statute authorizes the Director to appoint a hearing officer to conduct the formal hearing, it requires that the Director make the findings and conclusions.

In *Casco*,<sup>5</sup> the Kansas Supreme Court held:

When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.

"Statutory interpretation begins with the language selected by the legislature. If that language is clear, if it is unambiguous, then statutory interpretation ends there as well."<sup>6</sup>

The appellees argue that the Initial Order of the PO is the equivalent of an order from the Director. The Board does not find that intent expressed in the statute. If the Legislature had intended for the hearing officer or officers to make the determination and for that decision to be appealable to the Board, then it would have said so. The plain language of the statute shows that such was not the Legislature's intent.

The Board has jurisdiction to review the decision of the Director, not of the PO. Accordingly, in the absence of a decision by the Director, this appeal is premature.

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<sup>5</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 6, 154 P.3d 494 (2007).

<sup>6</sup> *Graham v. Dokter Trucking Group*, 284 Kan. 547, 556-57, 161 P.3d 695 (2007).

**CONCLUSION**

The Initial Order entered by the PO is not a final order. The Board is without jurisdiction to review that Initial Order.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that this appeal from the Initial Order of Presiding Officer Sandra L. Sharon dated November 14, 2008, is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Charles W. Hatfield, Attorney for Appellant OHS  
Frederick J. Greenbaum, Attorney for appellees KASB Risk Management  
Services, et al.  
Sandra L. Sharon, Presiding Officer, Office of Administrative Hearings, Kansas  
Department of Administration  
Paula Greathouse, Director, Division of Workers Compensation, Kansas  
Department of Labor